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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 155.

LOUIS KIRSHBAUM,

Appellant,

vs.

THE CITY OF LOS ANGELES, a municipal corporation, THE CITY COUNCIL OF THE CITY OF LOS ANGELES, LOS ANGELES DODGERS, INC., and THE HOUSING AUTHORITY OF THE CITY OF LOS ANGELES,

Appellees.

On Appeal From the Supreme Court of the State of California.

MOTION OF LOS ANGELES DODGERS, INC. TO DISMISS.

Appellee Los Angeles Dodgers, Inc., respectfully moves that the above-entitled appeal be dismissed on the grounds that (1) the appeal presents no substantial federal question, and (2) the federal questions sought to be reviewed were not timely or properly raised, or expressly passed upon below.

Opinions Below.

The opinion in the Supreme Court of California in this case (J.S. App. 1)* is reported in 51 Adv. Cal. 425. The opinion in the Supreme Court of California in the related cases of *Ruben v. City of Los Angeles* and *Kirshbaum v. City of Los Angeles* is reported in 51 Adv. Cal. 861 and a copy thereof is attached hereto as an appendix (hereinafter referred to as "App."). The opinion of the Los Angeles Superior Court in the related case of *Kirshbaum v. Housing Authority* (J.S. App. 17) is not reported.

Jurisdiction.

The judgment of the Supreme Court of California was filed on January 13, 1959, and appellant's petition for rehearing was denied without opinion on February 11, 1959 (Clk. Tr. v. 1).** Notice of appeal to this Court was filed on April 30, 1959 (Clk. Tr. v. 1). The jurisdiction of this Court is sought to be invoked under Section 1257(2) of the Judicial Code (28 U.S.C. §1257(2)).

Questions Presented.

The City of Los Angeles and Los Angeles Dodgers, Inc., negotiated a contract under which the City is to convey to the Dodgers certain property for use as a baseball stadium site, and the Dodgers are to convey to the City certain other real property and to construct and maintain certain public recreational facilities. As required by the City Charter, the contract was embodied in a municipal ordinance which the City Council and Mayor approved.

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*Throughout this Motion, references to pages of the Jurisdictional Statement are made as follows: "J.S. ...." and to pages of the appendix thereof as follows: "J.S. App. ....."

**Throughout this Motion, references to the volumes of the transcript of the record, as prepared by the Clerk of the court below, are made as follows: "Clk. Tr. v. ....."

Subsequently, the ordinance was approved by a majority of the voters at a referendary election.

Appellant thereupon brought a taxpayer's suit in the Superior Court of Los Angeles County seeking to enjoin the certification of the referendary election upon the ground that the ordinance (and contract) would be invalid. The Superior Court granted a preliminary injunction. The City then commenced the instant case as an original action in the Supreme Court of California seeking a writ of prohibition to restrain the Superior Court from enforcing its preliminary injunction or from taking any further steps in the injunction suit. The Supreme Court of California ordered the issuance of a peremptory writ of prohibition as prayed for, holding, *inter alia*, that there were no unresolved issues of fact; that, therefore, prohibition would lie under state law to test the validity of the contract; and that the contract as a whole was for a public purpose and was in all respects valid.

In these circumstances, the principal question presented is whether the Supreme Court of California deprived appellant of due process of law by ruling upon the validity of the contract in the prohibition proceeding and granting a writ to prevent the Superior Court from proceeding with the injunction action.

The only other question argued by appellant is whether he, as a City taxpayer, had rights in the property to be conveyed to the Dodgers which were impaired by the contract to convey.*

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*This statement of Questions Presented embraces appellant's Questions 1, 2, 4 and 6—the only questions as to which any argument is made in the Jurisdictional Statement. Appellant has left unargued his Questions 3, 5 and 7. As will also appear in the argument to follow, none of appellant's questions—with the possible exception of Question 6—was timely raised.

Statement.

In October, 1957, the City Council of the City of Los Angeles adopted and the Mayor of the City approved Ordinance No. 110,204. The ordinance provided that the City "enter" into a certain contract with the Brooklyn National League Baseball Club (now known as Los Angeles Dodgers, Inc.) in form substantially as set forth in the ordinance. Within the time prescribed by the Charter of the City of Los Angeles, referendary proceedings with reference to the ordinance were instituted.

The referendary election was held on June 3, 1958, and resulted in a majority vote in favor of the adoption of the ordinance. Under the City Charter (§§ 284 and 305, 1925 Cal. Stat. 1116 and 1951 Cal. Stat. 4392, respectively), it then became the duty of the City Council to declare the result of the election, thus rendering the ordinance effective as having been duly adopted by the voters.

Before this declaration was made by the Council, appellant Kirshbaum commenced a taxpayer's injunction suit.* In that action Kirshbaum secured first a temporary restraining order and then, on hearing, a preliminary (*pendente lite*) injunction restraining the Council from declaring the result of the election in question.

Following the granting of the preliminary injunction, the City of Los Angeles filed an original proceeding in the Supreme Court of California seeking a writ of prohibition to restrain the Superior Court of Los Angeles County from enforcing the preliminary injunction or from taking any further proceedings in the injunction suit. It is this

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*Kirshbaum v. City of Los Angeles, et al., Los Angeles County Superior Court No. 703,023. This is the action referred to by appellant (J.S. 12) and herein as the "referendum case."

prohibition proceeding which is the subject of the instant appeal in this Court.

The prohibition case was argued before the Supreme Court of California on November 6, 1958. At the argument, it was stipulated that the records in two earlier filed and tried companion cases, *Ruben v. City of Los Angeles, et al.*, Los Angeles Superior Court No. 687,210, and *Kirshbaum v. Housing Authority, et al.*, Los Angeles Superior Court No. 699,077,* might be deemed to be before the court in the prohibition proceeding. Like the injunction suit first mentioned above (viz., the referendum case), these latter actions were also taxpayer's actions seeking to enjoin the execution or performance of the proposed contract between the City and Los Angeles Dodgers, Inc., on various grounds. As indicated above, these latter actions had been tried and decided by the Superior Court** prior to the argument in the California Supreme Court in the instant case.

Following supplemental briefing, the Supreme Court of California, on January 13, 1959, rendered its opinion and judgment in the prohibition proceeding upholding the validity of the proposed contract and ordered that a peremptory writ issue as prayed. Appellant's petition for rehearing was denied on February 11, 1959. Notice of appeal to this Court was filed on April 30, 1959.

On May 27, 1959, the Supreme Court of California issued its peremptory writ of prohibition commanding the

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*Referred to by Appellant at J.S. 7 and 10 and sometimes referred to herein as the "first *Kirshbaum* case" or "first *Kirshbaum*."

**The decision of the Superior Court in those cases (J.S. App. 17) against the validity of the proposed contract was later reversed, with directions, by the California Supreme Court. *Ruben v. City of Los Angeles, Kirshbaum v. Housing Authority.* (App. 1.)

Superior Court to refrain from any further proceedings in the referendum case, *Kirshbaum v. City of Los Angeles*, and such writ was served on the respondent Superior Court and duly filed. On May 28, 1959, the City Council, being freed by the issuance of the writ from the restraint theretofore imposed by the preliminary injunction in the referendum case, duly declared the result of the referendary election above mentioned, thereby rendering Ordinance No. 110,204 effective and operative. See Los Angeles City Charter §284, 1925 Cal. Stat. 1116. On June 3, 1959, the proposed contract, in precise form as set forth in Ordinance No. 110,204 (J.S. App. opposite p. 44), was duly executed by both parties thereto and is now operative as Contract No. 27562 of the City of Los Angeles.

As is apparent both from the record and from the jurisdictional statement herein, all claims of appellant stem from various provisions of the contract under attack. The salient portions of the contract were epitomized in the opinion of the California Supreme Court, as follows:

> "The contract, as set forth in Ordinance No. 110,204, provides that the City will convey to the ball club 185 acres, more or less, of land presently owned by it in Chavez Ravine and will use its best efforts to acquire at a reasonable cost and convey additional land to make a total of about 300 acres, reserving, among other things, an oil drilling site not to exceed five acres, the location of the site to be mutually agreed upon by the parties. Title to 40 acres of the 300, to be designated by the ball club, is to be retained by the city for 20 years to assure performance by the ball club of its obligations to provide and maintain certain recreational facilities during that period, after which title is to be conveyed to the club.

"The city is to employ its best efforts to have eliminated or modified a deed provision restricting the use of certain property acquired by the city from the Los Angeles Housing Authority, provided that if the city is unable to have the restriction altered to permit the use contemplated by the ball club, the contract shall be of no further effect. Upon conveyance of the property to the club, existing public streets therein no longer needed for street purposes will be vacated, and the city, upon demand of the ball club, is to commence proceedings to vacate such streets and deliver title to the club. Prior to passage of title to any of the 300 acres, the city is to spend up to but not to exceed $2,000,000, in the manner to be designated by the ball club, to place such property in a proper condition to convey to the ball club. The city also is to perform certain acts with respect to construction of additional streets, rezoning the property, and obtaining funds from the county for access roads.

"The ball club agrees to construct on the Chavez Ravine property, at its expense, a modern baseball stadium seating at least 50,000 people. It will move to Los Angeles the present Brooklyn National League franchise and ball team known as the "Dodgers." Further, the club will convey to the city the land and improvements known as Wrigley Field, reserving the right to use of the field until the stadium is completed, conditioned upon payment of a rental to be mutually agreed upon.

"Recreational facilities costing not over $500,000 are to be constructed by the ball club on the 40-acre portion of the Chavez Ravine property referred to above, such facilities to be mutually agreed upon prior

to conveyance of the property. The club is to maintain the recreational facilities on the 40-acre parcel at an annual cost of $60,000, and in the event the maintenance does not amount to that much in any year, the club is to pay the city the difference between $60,000 and the actual cost. The ball club is under no obligation to furnish personnel for the operation of the recreational facilities, and, with certain exceptions, the city is to have control of them.

"In addition, the agreement contains a number of recitals of fact and declarations of policy to the general effect that the contract will be beneficial to the city and that the property which the city now owns and is to convey to the ball club is no longer required for the use of the city.

"The city reserves all mineral rights in the Chavez Ravine property, and it is to acquire all mineral rights in Wrigley Field. The agreement directs that one-half of the receipts from the mineral rights is to be placed by the city in a special trust fund and expended solely for the purpose of providing and maintaining recreational facilities to promote the youth program of the ball club, the location and type of facilities to be mutually agreed upon by the parties. The ball club has given formal notice to the city that the club has waived and relinquished all rights conferred upon it under these provisions and has assigned to the city all such rights. The provisions being solely for the benefit of the club, it could properly waive them, and there is no longer any reason to treat them as parts of the contract." (J.S. App. 4-6.)

ARGUMENT.

The Statement as to Jurisdiction asks this Court to review a decision of the California Supreme Court upholding the validity of a contract between the City of Los Angeles and the Los Angeles Dodgers, Inc.* In its main aspect, this contract is nothing more than an agreement for the exchange of real property. The only real question involved below was the validity of the contract *under state law,* and on this point the Supreme Court of California approved the contract emphatically, unanimously, and not once but twice.** Thus, although the baseball stadium referred to in the contract is naturally a matter of interest to the sports world, the local controversy over the validity of the contract does not present any important or recurrent question of federal law.

The attempt of appellant to inject federal questions into this case constitutes, in the main, a mere afterthought. Neither of the two opinions of the Supreme Court of California discusses any of the so-called federal questions which appellant now belatedly seeks to urge upon this Court. With but one possible exception, the questions were not timely raised, and, in any event, they all were and are devoid of substance.

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*Only because the contract required authorization by an ordinance passed by the City Council is there any possible basis for an appeal under Section 1257(2) of the Judicial Code. See Los Angeles City Charter §390, 1935 Cal. Stat. 2360; and see Los Angeles City Charter §§281 and 385, 1931 Cal. Stat. 2626 and 1949 Cal. Stat. 3124, respectively.

**See, in addition to the opinion below, the opinion in *Ruben v. City of Los Angeles,* and *Kirshbaum v. Housing Authority.* (App. 1.)

I.

The Federal Questions Sought to Be Raised by Appellant Are Unsubstantial.

Appellant seeks to raise seven separately-stated but overlapping questions. For convenience, the argument in support of this Motion to Dismiss will be organized in terms of appellant's seven "Questions Presented."

A. Questions 1 and 2 Concerning the Asserted Usurpation by the California Supreme Court of the Jurisdiction of the Los Angeles County Superior Court.

Appellant's principal contention in this Court is that the California Supreme Court denied him due process of law in that it "unconstitutionally" interfered with or divested the Superior Court of Los Angeles County of the latter's jurisdiction. (J.S. 4, 19-28.) In substance, this is a claim that the California Supreme Court misinterpreted its power under the state Constitution "to issue writs of . . . prohibition, . . . and all other writs necessary or proper to the complete exercise of its appellate jurisdiction." California Constitution, Article VI, Section 4.

"But it is . . . well settled that it is for the Supreme Court of a State finally to determine its own jurisdiction and that of other local tribunals, since the decision involves a construction of the laws of the State by which the court was organized." *Standard Oil v. Missouri*, 224 U.S. 270, 281. "And . . . there is nothing in the clauses of the Fourteenth Amendment guaranteeing due process and equal protection which converts an issue respecting the jurisdiction of a state court under the constitution and statutes of the State into anything other than a question of state law, the decision of which by the state court of last resort is binding upon this court." *Gasquet v. Lapeyre*, 242 U. S. 367, 369.

It follows that appellant's Questions 1 and 2 are unsubstantial. "The due process clause does not take up the laws of the several States and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law." *Enterprise Irrig. Dist. v. Canal Co.*, 243 U. S. 157, 166; and see *Neblett v. Carpenter*, 305 U. S. 297, 302.

In any event, there is no merit to appellant's contention that prohibition was improper under state law. That contention is bottomed on a claim that several specific "questions of fact" which bore on the issue of the validity of the contract had not yet been tried in the Superior Court.* But that claim is unavailable for the simple reason that *all* issues of fact relating to the validity of the Ordinance which were tendered by appellant in his complaint in the referendum case were actually tried by the Superior Court in the first *Kirshbaum* case, and the record in first *Kirshbaum* was by stipulation before the Supreme Court of California in the prohibition proceeding.** Moreover, as was pointed out to the court below, there was no conflict in the evidence in either *Ruben* or first *Kirshbaum*—cases which had actually been tried.*** In such circumstances the Supreme Court of California

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*See J.S. 14-15.

**Clk. Tr. v. I (Brief of Kirshbaum in opposition to writ, filed Dec. 11, 1958, pp. 3-6a); Clk. Tr. v. I (Transcript of oral argument before Supreme Court on Nov. 6, 1958, pp. 39-41).

***Clk. Tr. v. I (Supplemental Brief of RPI (Real Party in Interest) Dodgers, filed December 3, 1958, pp. 3-6). At J.S. 10 appellant refers to certain "findings" which were assertedly made by the Superior Court in the first *Kirshbaum* case. These were not findings; they were conclusions of law held to be erroneous by the state Supreme Court on the first *Kirshbaum* case appeal, *Kirshbaum v. Housing Authority*. (App. 1.) The findings actually made by the Superior Court in that case were innocuous and are found in Clk. Tr. v. II (Kirshbaum clerk's transcript pp. 28-29).

was fully empowered to determine the meaning and validity of the contract as a matter of law. *E.g., Estate of Platt*, 21 Cal. 2d 343, 352.

Accordingly, the state Supreme Court was amply justified in its holding below that "none of the persons attacking the contract has pointed to any evidence which would present a substantial question of fact upon a material issue." (J.S. App. 4.) This is a complete answer to appellant's contention. Certainly a disagreement with the state Supreme Court's appraisal of the record before it (including, by stipulation, the record in both the *Ruben* and first *Kirshbaum* cases), does not present a federal question of substance.

Furthermore, and wholly apart from their lack of substance, Questions 1 and 2 were not timely or properly raised below. In response to the Petition for Writ of Prohibition, appellant initially filed a paper entitled "Points and Authorities by Louis Kirshbaum in Opposition to Petition for Prohibition." (Filed August 25, 1958, Clk. Tr. v. I.) In that document appellant made no claim at all based upon the Constitution or laws of the United States.

Thereafter, following the oral argument in this prohibition proceeding, appellant filed a second document with the court below entitled "Brief of Respondent Louis Kirshbaum in Opposition to Application for Prohibition." (Filed December 11, 1958, Clk. Tr. v. I.) In that brief appellant contended: "If in the determination as to whether the proposed contract is valid, evidence was required on any question of fact, prohibition by the Supreme Court [of California] would constitute a denial of due process of law." (p. 54.) And he made the same contention, in the same form, at the oral argument. (J.S. App. 44.) "But it is settled that such an averment making no reference to the Constitution of the United States and asserting no

express rights hereunder is solely referable to the state Constitution, which in this instance has a due process clause,* and affords no basis whatever for invoking the jurisdiction of this court." *Bowe v. Scott*, 233 U. S. 658, 665.

Actually, Questions 1 and 2 were first raised by appellant in his "Petition for Rehearing After Decision by the Supreme Court," and said petition was denied without opinion. Those questions, therefore, are not now reviewable here since they were not seasonably presented or expressly passed upon in the court below. *Radio Station WOW v. Johnson*, 326 U. S. 120, 128.

B. Questions 4 and 6 Concerning the So-Called "Public Purposes" Restriction and Its Contemplated Removal.

Apart from his discussion of Questions 1 and 2, appellant has presented an argument only on the points embraced in his Questions 4 and 6. All of the remaining Questions Presented—*i. e.*, Questions 3, 5 and 7—remain posed but unargued. Accordingly, we turn next to consider Questions 4 and 6 in which appellant challenges the constitutional validity of the contract by reason of the provision for the removal of a deed restriction**

*California Constitution, Art. I, Sec. 13.

**In passing, we note that appellant's Questions 3 through 7 are each stated in terms of whether the City Council and its Mayor violated the federal Constitution "in approving" (or "in adopting") the ordinance. As previously noted (*supra*, pp. 4 and 6), the ordinance did not "take effect" until the results of the referendary election were declared by the City Council, almost twenty months after the Council adopted and the Mayor approved the ordinance. Thus, as articulated by appellant, his Questions 3 through 7 present issues as to the constitutional validity of a single intermediate step in the legislative process of the City of Los Angeles. As an example in the federal field, we believe it is clear that the constitutional validity of a congressional enactment could not arise prior to presidential approval of the Act. For the same reason, we believe it is clear that appellant's questions, in the form presented, are not reviewable here.

Insofar as appellant invokes the Fourteenth Amendment (Question 4), the question was clearly not timely raised, for it was posed for the first time on petition for rehearing and was not expressly passed upon. *Radio Station WOW v. Johnson, supra*, 326 U. S. 120, 128. The point with reference to Article I, section 10 of the Constitution (Question 6), is the only federal question which might be thought to have been was timely raised by appellant in the California Supreme Court prior to its decision of January 13, 1958.* But it, like the other questions now sought to be raised, was and is devoid of substance.

The California Supreme Court considered appellant's contention that the City did not have power to sell to a private corporation land held by the City subject to a public purpose deed restriction. The court stated with respect to the removal of the deed restriction:

> "This contention relates to land acquired from the Housing Authority of the City of Los Angeles by a deed containing a restriction reading, in part, 'to be used for public purposes only; and not to be used directly or indirectly by the City of Los Angeles, or its grantees, successors in interest, assigns, or any

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*Appellant did not raise this question in his points and authorities in opposition to the petition for prohibition. (Clk. Tr. v. I, filed Aug. 25, 1958.) And he filed no answer or demurrer to the petition by way of a return to the alternative writ issued by the court below on October 16, 1958. (Clk. Tr. v. I.) See California Code of Civil Procedure, §§ 1104, 1105, 1089; Rule 56(c) of Rules on Original Proceedings in Reviewing Courts, 50 Cal. 2d 43. The only mention by appellant of a claim based upon Article I, section 10 of the federal Constitution is found in the appendices of a brief he filed in the California Supreme Court after the hearing in that court. (Clk. Tr. v. I, Brief of Kirshbaum in opposition to writ, filed Dec. 11, 1958, pp. B-17, B-28 and F-25 through F-28.) Although the court below granted leave to file that brief (Clk. Tr. v. I, Transcript of Oral Argument, p. 41), it is doubtful that an argument based upon federal law in the appendix thereof suffices to draw into issue a federal claim. *Cf., Zadig v. Baldwin*, 166 U. S. 485, 488.

other person or persons whatsoever claiming by, through or under the City of Los Angeles, for a period of 20 years from and after the date hereof, for residential development or residential subdivision.' The city, as we have seen, agrees to use its best efforts to have the restriction eliminated or modified to permit the use contemplated by the club, and it is provided that if the city is unable to have the restriction changed, the contract shall be of no further effect.

"The grantor did not intend by this provision to prohibit the city from selling the property; the provision contains no such limitation and plainly contemplates the possibility of a sale in that the restriction is made applicable to use of the property by the 'grantees' and 'assigns' of the city. . . ." (J. S. App. 12.)

And in its subsequent opinion in *Ruben v. City of Los Angeles* and *Kirshbaum v. Housing Authority*, the California court said further on this subject:

"The deed from the Housing Authority to the city, in addition to providing that the land was to be used for public purposes only, declared that the property was not to be used directly or indirectly by the city or its 'grantees, successors in interest, assigns, or any other person or persons whatsoever' claiming under the city for a period of 20 years for residential development. This language clearly shows that the city may make transfers to 'grantees' and 'assigns' as well as to its successors. The deed also implies that after the 20-year period the property may be used by the city's grantees for private residential purposes, that the city's grantees could at any time use the property

> for private purposes other than residential, and that the general restriction to public purposes, if not mere surplusage, was intended to apply only while the city retained the land." (App. 4.)

That construction of the deed by the California Supreme Court was in all respects reasonable and proper and should not be disturbed by this Court. *Millsaps College v. Jackson*, 275 U. S. 129, 132. It follows that appellant's contentions regarding the public purpose deed restriction are unsubstantial. His Question 4 expressly proceeds on the assumption—flatly contrary to the holding of the court below—that the deed prohibits the City from conveying such land to a private corporation for a private use. His Question 6 depends upon the same erroneous assumption.

Moreover, appellant has also failed to show any justiciable right as to which he is entitled to seek protection under the Constitution of the United States. It is clear under the decisions of both this Court and the courts of California that a taxpayer has no vested or proprietary interest in public funds or property.* *Schenebeck v. McCrary*, 298 U. S. 36; *cf., Farmers and Mechanics Savings Bank v. Minnesota*, 232 U. S. 516, 524; and see *City of Glendale v. Crescenta Mutual Water Co.*, 135 Cal. App. 2d 784, 795. A taxpayer's rights are limited to preventing any misapplication of public property. *City of Glendale v. Crescenta Mutual Water Co., supra.* Here, far from any suggestion of misapplication, the removal of the deed restriction is being brought about pursuant to a con-

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*Appellant apparently recognizes that his claim regarding the deed restriction assumes (albeit erroneously) that, as a taxpayer, he has "vested contractual rights" in the property involved. (J.S. 28.)

tract held by the highest court of the state to be for a public purpose and hence for the benefit of the citizens and taxpayers whom the City represents.*

Furthermore, where a charter city such as Los Angeles holds property in fee, whether charged with a public use or not, it is settled California law that the municipality may deal with it as it sees fit, subject only to the limitations and restrictions of its own charter. *Wiley v. City of Berkeley,* 136 Cal. App. 2d 10, 14, 15. Here, as the state Supreme Court was careful to point out, the charter not only did not *restrict* the right to transfer the property in question, it *authorized it.* (J.S. App. 11, 12.) This power reserved to the City by its charter plainly may not be denied by its own taxpayers. The result is that if and when the Housing Authority** gives *its* consent to the removal of the restriction, the last vestige of right to have the restriction enforced will have disappeared.

C. Question 3 Concerning the Utilization of Tax Moneys for the Asserted Purpose of Acquiring and Conveying Land to a Private Corporation.

Although applicant has made no argument in his Jurisdictional Statement in support of his Question 3, we nevertheless turn to it to show why it, too, does not merit review in this Court.

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*If the imposition of the restriction as between the Housing Authority and the City created a contract, appellant, as a member of the general public, can hardly be said to be a party to it. *Cf., Walsh v. Columbus, Hocking Valley & Athens R. Co.,* 176 U. S. 469.

**The Housing Authority is a state agency. Calif. Health & Safety Code, secs. 34200 *et seq.* The California Supreme Court held that, under state law, that agency has power to remove the deed restriction. *Ruben v. City of Los Angeles, Kirshbaum v. Housing Authority.* (App. 6-7.) See Calif. Health & Safety Code, sec. 34315; *cf., Reichelderfer v. Quinn,* 287 U. S. 315.

Question 3 was likewise first raised by appellant on rehearing in the court below. The question is thus not now reviewable here. *Radio Station WOW v. Johnson*, 326 U. S. 120, 128.

Furthermore, the question is without substance. It suggests that the contract is invalid under the due process clause of the Fourteenth Amendment in that one of its provisions requires the City to use its best efforts to acquire at a reasonable cost approximately 115 acres of additional land and convey it to the Ball Club along with the basic property. Thus, appellant seizes upon an isolated provision in the contract without regard to the contract as a whole. But significantly appellant nowhere attacks the holding below that the contract *as a whole* would serve legitimate public purposes. In this regard, the Supreme Court of California stated:

> "In considering whether the contract made by the city has a proper public purpose, we must view the contract as a whole, and the fact that some of the provisions may be of benefit only to the baseball club is immaterial, provided the city receives benefits which serve legitimate public purposes. (Cf. *City of Oakland v. Williams*, 206 Cal. 315, 319 et seq. [274 P. 328]; *County of Los Angeles v. LaFuente*, 20 Cal. 2d 870, 876-877 [129 P. 2d 378].) The transfer of Wrigley Field from the ball club to the city and the construction by the club on the 40-acre parcel of recreational facilities to be used by the city for 20 years, together with maintenance of the facilities for that period, are obviously for proper public purposes. * * *" (J.S. App. 8-9.)

In declining to attack that holding as to public purpose, appellant apparently realizes that "the requirements of due

process leave free scope for the exercise of a wide legislative discretion in determining what expenditures will serve the public interest" (*Carmichael v. Southern Coal Co.*, 301 U. S. 495, 514); that the question whether an "expenditure serves a public purpose is a practical question addressed to the law-making department, and would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court" (*Id.*, at 515); and that the authority of this Court to strike down "state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one" is one which is "exercised with the most extreme caution" (*Everson v. Board of Education*, 330 U. S. 1, 6).

It being undisputed here that the contract authorized by the ordinance would benefit the City and would serve legitimate public purposes, any claim that one of the provisions of the contract and ordinance is unlawful because *by itself* not beneficial to the public is plainly unsubstantial. "The end being legitimate, the means is for the legislature to choose." *Carmichael v. Southern Coal Co., supra*, 301 U. S. at 518. The court below was patently correct when it said:

> "In our opinion the city can properly agree that, in return for legitimate benefits which it will receive under the contract, it will use its best efforts to acquire additional land to convey as part of the consideration to be furnished by it, even though the city is in effect agreeing to purchase land for the purpose of selling it immediately thereafter to a private corporation. If the city had so desired, it clearly could have added to the contract price, in cash, the reasonable value of the additional land which it agreed to use

its best efforts to acquire, and there is no essential difference if the city, instead of paying the amount in cash, uses the money to acquire property and then conveys the property as part of the contract consideration. Section 2(11)(1) of the city charter authorizes the city to buy 'anything useful or convenient' in connection with the exercise of the city's powers. While a city may not purchase land when no public use or purpose is involved, in the present case the additional land is to be acquired for a proper public purpose, namely, that of furnishing the type of contract consideration which enables the city to enter into a bargain which it deems advantageous. . . . This case does not present the situation of a municipal government which seeks to purchase property for the purpose of making a gift of it to a private enterprise or of otherwise improperly using city funds to aid private persons, because the property which the city is to endeavor to buy, if acquired, will not be given away to anyone but will be used as part of the consideration of a contract entered into for a legitimate public purpose." (J.S. App. 10-11.)

D. Question 5 Concerning the Asserted Delegation to a Private Corporation of the Power to Determine the Manner in Which Tax Money Is to Be Spent.

Question 5, which appellant also has not supported by any argument, concerns the provision in the contract (par. 3) which provides that prior to the passage of title of the land to be conveyed by the City to the Dodgers, the City will spend up to $2,000,000 to place the property in a proper condition to be conveyed, "the manner in which such money will be spent for such purposes to be designated by Ball Club." The assumption in appellant's ques-

tion—that that provision gives the Dodgers "unlimited power" to determine how the money is to be spent—is shown to be incorrect by the opinion below. The Supreme Court of California held that no expenditures could be made under that provision which were not consistent with the general purposes of the contract. The court stated:

> "We find no merit to the claim that the city has attempted to make an illegal delegation to a private corporation of the duties of the city council by agreeing that, prior to passage of title, the city shall spend $2,000,000 to place the Chavez Ravine property 'in a proper condition to convey to' the ball club, the manner in which the money will be spent for such purpose to be designated by the club. *It seems obvious that the city could not be required by the ball club, under this provision, to make any expenditures not in accord with the general purposes of the contract.* The city could have paid the money to the club outright, as part of the contract consideration, without retaining any control over the manner or purpose for which the money should be spent, and the arrangement by which *the city will keep possession of the money until it is spent and, in addition, retain some control of how it is spent,* is an advantage to the city which does not militate against the validity of the contract." (J.S. App. 13; emphasis supplied.)

That construction of the contract makes it clear that no federal issue of substance is presented by Question 5.

In any event, it is again sufficient to note that this question was first raised by appellant in his petition for rehearing, which was denied without opinion.

E. Question 7 as to the Asserted Tax Exemption.

The factual background for this contention is simple. As security for the Ball Club's engagement to construct and maintain recreational facilities upon a selected 40-acre parcel of the property to be conveyed, the City is to retain title to the parcel for 20 years. Then, after performance by the Ball Club, the City is to convey the property without further consideration. (Contract, par. 1(c).) During the 20-year period, the City will be the owner of the property and will have general control of the recreational facilities to be bought, paid for, and maintained by the Ball Club. Title will not vest in the Dodgers until the expiration of that period and it will only vest then upon performance of the conditions precedent.

The conjuring up of a *tax exemption* to the Dodgers under this situation is wholly fanciful. One is not *exempt* from the payment of taxes on property which he does not own; the property is simply not *taxable* to him.

Furthermore, the questions of exemptions from state taxation is wholly a matter of state policy. Even if we were to assume, contrary to the fact, that the provisions of the contract under discussion may be regarded as state action creating an exemption as to the Dodgers, this would still confer no rights upon appellant under the Fourteenth Amendment. *Missouri v. Dockery,* 191 U. S. 165.

Finally, this question, too, was first raised in appellant's petition for rehearing, which, as previously noted, was denied by the Supreme Court of California without opinion. The question is therefore not now open to review.

Conclusion.

For the foregoing reasons, Appellee Los Angeles Dodgers, Inc. urges that the appeal herein should be dismissed. If the papers whereon the appeal was taken are to be treated as a petition for certiorari pursuant to 28 U. S. C. Section 2103, certiorari should be denied.

Respectfully submitted,

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July, 1959.

APPENDIX.

Opinion of the Supreme Court of the State of California.

[L. A. No. 25238. In Bank. Apr. 21, 1959.]

JULIUS RUBEN et al., Plaintiffs and Respondents, v. CITY OF LOS ANGELES et al., Appellants.

[L. A. No. 25239. In Bank. Apr. 21, 1959.]

LOUIS KIRSHBAUM, Plaintiff and Appellant, v. THE HOUSING AUTHORITY OF THE CITY OF LOS ANGELES et al., Defendants and Respondents; CITY OF LOS ANGELES et al., Defendants and Appellants.

[1] **Municipal Corporations—Contracts—Construction.**—A deed from a city Housing Authority to the city which, in addition to providing that the land was to be used for public purposes only, declared that the property was not to be used directly or indirectly by the city or its "grantees, successors in interest, assigns, or any person or persons whatsoever" claiming under the city for a period of 20 years for residential development clearly shows that the city may make transfers to "grantees" and "assigns" as well as to its successors, and implies that after the 20-year period the property may be used by the city's grantees for private residential purposes, that the city's grantees could at any time use the property for private purposes other than residential, and that the general restriction to public purposes, if not mere surplusage, was intended to apply only while the city retained the land.

[2] **Prohibition—Determination—Scope and Effect.**—A prior decision of the Supreme Court restraining the superior court from enforcing a preliminary injunction or taking further action in a taxpayer's suit to enjoin certification of the result of a referendum election in which a majority of the voters favored adoption of an ordinance authorizing a contract between the city and a baseball club to erect a stadium on land which the city Housing Authority had deeded to the city, that the grantor, in providing that the land was to be used for public purposes only and was not to be used by the city's grantees or successors in interest for a period of 20 years for residential development, did not intend to prohibit the city from selling the property necessarily included a determination that the deed did not operate as a dedication to public use or as the creation of a trust binding on grantees of the property, and that the Housing Authority could properly release any interest it retained; and the prior decision thus foreclosed the taxpayer's contentions in his subsequent suit that the property was dedicated to a public use, that the land was held in trust by the city for the public, that the city had no power to abandon or sell it to a private corporation, and that the Housing Authority could not subsequently qualify the terms of the conveyance.

[3] **Id.—Determination—Scope and Effect.**—Although a city Housing Authority was not a party to a prior prohibition proceeding in which the Supreme Court determined that the provisions of a deed from the Housing Authority to the city permitted the city to sell the conveyed property free from any public use or trust and that the deed did not preclude the Housing Authority from releasing any interest it may have retained, the Housing Authority was entitled, in a taxpayer's suit to prevent execution and enforcement of a contract between the city and a baseball club to erect a stadium on land which the Housing Authority had conveyed to the city, to rely on such determination, because the issue of whether the deed amounted to a dedication was decided in the prohibition proceeding and, in view of the fact that the taxpayer had his day in court, he could not relitigue the matter.

[4] **Housing—Housing Authorities Law—Powers and Duties.**—Under Health & Saf. Code, § 34315, subd. (e), providing that a housing authority may sell, lease, exchange, transfer, assign, pledge or dispose of any real property "or any interest in it," a city Housing Authority was authorized to release to the city any interest retained under a deed from the Housing Authority to the city.

[5] **Municipal Corporations—Remedies of Taxpayers.**—In actions by taxpayers of a city to prevent execution and enforcement of a contract between the city and a baseball club for erection of a stadium on land which had been conveyed to the city, a contention that a parcel of land in a park to be conveyed to the baseball club pursuant to the contract was subject to control of the city's Department of Recreation and Parks under the city charter was premature where it did not appear that any actual sales or transfers of property to the baseball club had yet been made and the city still had opportunity to comply with charter requirements, and where, at the time of trial, proceedings were pending before the city council to transfer the parcel in question from the jurisdiction of the park department on the ground that freeway construction cut off the property from the balance of the park.

[6] **Appeal—Appellate Jurisdiction—Moot Questions.**—A cross-appeal by a city taxpayer who obtained a judgment against the city and a baseball club in his action to prevent execution and enforcement of a contract between the city and the club on land which had been conveyed to the city, but who filed the cross-appeal without any explanation or specification of error, became moot and should be dismissed in view of the conclusion in the appeal of the city and the club, that he was entitled to any relief, even if it be assumed that he could have brought himself within some exception to the general rule that a party cannot appeal from a judgment in his favor.

APPEAL from judgment of the Superior Court of Los Angeles County. Arnold Praeger and Kenneth C. Newell, Judges. Affirmed in part and reversed in part with directions.

Actions by taxpayers of a city against city and city Housing Authority to prevent execution and enforcement of a contract between the city and a baseball club. Judgment for defendant Housing Authority and its commissioners, affirmed; judgments against other defendants reversed with directions.

Phill Silver for Plaintiff and Appellant.

Roger Arnebergh, City Attorney, Bourke Jones, Assistant City Attorney, Weldon L. Weber, Deputy City Attorney, Joe Crider, Jr., O'Melveny & Myers and Pierce Works for Defendants and Appellants.

Julius Ruben, in pro. per., for Plaintiffs and Respondents.

James J. Arditto for Defendants and Respondents.

GIBSON, C. J.—These two actions were brought by taxpayers of the City of Los Angeles to prevent execution and enforcement of the contract between the city and the Brooklyn National League Baseball Club, Inc., which was considered by this court in *City of Los Angeles v. Superior Court, ante,* *p. 423 [333 P.2d 745]. Plaintiffs seek a declaration that the contract and the ordinance authorizing it are invalid and an injunction against the doing of any acts to carry out the ordinance and the contract. Kirshbaum also seeks an injunction restraining the Housing Authority from extinguishing a restriction contained in a deed by the Authority to the city of certain land involved in the contract.

A general demurrer of the Housing Authority and its commissioners was sustained in the Kirshbaum case, and a judgment was entered decreeing that Kirshbaum take nothing against them. After trial with respect to the remaining defendants a judgment was rendered in each case enjoining the execution of the contract and the carrying

*Advance Report Citation: *Ante,* p. 425.

out of the provisions of the ordinance. These defendants, including the city and the baseball club, have appealed from the judgments against them. Kirshbaum has taken a cross-appeal from the judgment in his favor, and, in addition, he has appealed from the judgment in favor of the Housing Authority.

Kirshbaum's complaint, insofar as concerns the relief sought against the Housing Authority, alleges that in 1955 the Housing Authority conveyed to the city the fee to 160.62 acres of land in Chavez Ravine, that this land is a portion of the land to be transferred to the baseball club by the city under the contract referred to above, and that the deed provided that the property was granted to the city "to be used for public purposes only." It is alleged that the Housing Authority is about to take steps to eliminate the public purpose limitation, and the complaint seeks to enjoin removal of the restriction.

[1] The deed from the Housing Authority to the city, in addition to providing that the land was to be used for public purposes only, declared that the property was not to be used directly or indirectly by the city or its "grantees, successors in interest, assigns, or any other person or persons whatsoever" claiming under the city for a period of 20 years for residential development. This language clearly shows that the city may make transfers to "grantees" and "assigns" as well as to its successors. The deed also implies that after the 20-year period the property may be used by the city's grantees for private residential purposes, that the city's grantees could at any time use the property for private purposes other than residential, and that the general restriction to public purposes, if not mere surplusage, was intended to apply only while the city retained the land.

Any doubt as to the proper construction of the instrument and the rights of the city and the Housing Authority thereunder was resolved in *City of Los Angeles v. Superior Court*, **ante*, pp. 423, 435-437 [333 P.2d 745], where both Ruben and Kirshbaum appeared. In that case we granted a writ of prohibition restraining the superior court from

*Advance Report Citation: *Ante*, pp. 425, 437-438.

enforcing a preliminary injunction or taking further action in a suit to enjoin certification of the result of a referendum election in which a majority of the voters favored adoption of the ordinance authorizing the contract.[1] We held that the grantor did not intend by the restriction to prohibit the city from selling the property and that the city could sell it pursuant to section 393 of the charter which, with certain exceptions not pertinent to this question, permits property no longer required by the city to be sold upon such terms and conditions as the council prescribes by ordinance. We further held, in determining the validity of the city's promise to use its best efforts to have the deed restriction removed, that any possibility that the Housing Authority may have a right to complain of a termination of the public use will disappear if the city is able to obtain the Housing Authority's consent to eliminate the restriction.

[2] Our decision in *City of Los Angeles v. Superior Court, ante,* †p. 423 [333 P.2d 745], forecloses Kirshbaum's contentions that as a result of the deed restriction the property was dedicated to a public use, that the land is held in trust by the city for the public, that the city has no power to abandon or sell it to a private corporation, and that the Housing Authority cannot qualify the terms of the conveyance by any subsequent act or declaration. The holding in that case necessarily included a determination that the deed did not operate as a dedication to a public use or as the creation of a trust binding upon grantees of the property, and it likewise included a determination, insofar as concerns the character of the instrument, that the Housing Authority may properly release any interest which it retains under the deed and that such a release will be effective to permit the city to proceed with the contemplated sale to the baseball club.

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[1]Although the binding effect of a prior judgment is a defense that must ordinarily be pleaded and proved (Code Civ. Proc., § 1962, subd. 6), where the judgment in one suit becomes final while an appeal is pending from the judgment in another action, the first final judgment may be brought to the attention of the court in which the appeal is still pending and may be relied on as res judicata (see *Domestic & Foreign Petr. Co. v. Long,* 4 Cal.2d 547, 562 [51 P.2d 73]; 3 Witkin, California Procedure (1954) 1935).

†Advance Report Citation, *Ante,* p. 425.

[3] The Housing Authority, although not a party to the prohibition proceeding, is entitled in the present action by Kirshbaum to rely upon the prior determination, because the issue of whether the deed amounted to a dedication was decided there and, in view of the fact that Kirshbaum had his day in court, he cannot now reargue the matter. (*Bernhard v. Bank of America*, 19 Cal.2d 807, 811 *et seq.* [122 P.2d 892].)

Since we have decided in *City of Los Angeles v. Superior Court, ante*, *p. 423 [333 P.2d 745], that the provisions of the deed permitted the city to sell the conveyed property free from any public use or trust and that the deed did not preclude the Housing Authority from releasing any interest which it may have retained, we are not governed here by cases which hold that a conveyance of property to a city for a specific purpose, i.e., for a park or a street, may by reason of the language in the deed amount to a dedication to a public use irrevocable by either the grantor or the city. (See *Wattson v. Eldridge*, 207 Cal. 314, 318-320 [278 P. 236]; *Slavich v. Hamilton*, 201 Cal. 299, 302 et seq. [257 P. 60]; *Archer v. City of Salinas*, 93 Cal. 43, 49 et seq. [28 P. 839, 16 L.R.A. 145]; *Washington etc. Co. v. City of Los Angeles*, 38 Cal.App. 2d 135, 136-138 [100 P.2d 828]; *Lowell v. City of Boston*, 322 Mass. 709 [79 N.E.2d 713, 725-726].)[2]

[4] In our prior decision we expressly withheld consideration of the question whether or not the Housing Authority has power, i.e., the legal capacity under applicable statutes regulating its powers and duties, to execute a release of its rights under the deed restriction. (*Ante*, at †pp. 436-437.) Kirshbaum's complaint, however, contains no allegations that would permit a conclusion that the Housing Authority lacks such power. On the other hand,

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*Advance Report Citation: *Ante*, p. 425.

[2]It may be noted, however, that in these cases property was transferred to a municipal corporation for a single, specified public purpose, unlike the transfer generally, for all "public purposes," made by the Housing Authority's deed, and that none of the conveyances in these cases contained language like that in the deed involved here which shows that the city may dispose of the property to "grantees" or "assigns."

†Advance Report Citation: *Ante*, pp. 425, 438.

subdivision (e) of section 34315 of the Health and Safety Code provides that a housing authority may sell, lease, exchange, transfer, assign, pledge, or dispose of any real property "or any interest in it." This legislation is ample to permit the Housing Authority to release to the city any interest retained under the deed.

It follows from what we have said that no cause of action has been stated against the Housing Authority and that the trial court properly sustained the general demurrer.

With one exception all of the questions relating to the judgment in the Ruben and Kirshbaum cases which enjoined execution and enforcement of the contract were resolved against the taxpayers by our decision in *City of Los Angeles v. Superior Court, ante,* *p. 423 [333 P.2d 745]. [5] Kirshbaum contends that a parcel of land in Elysian Park to be conveyed to the baseball club pursuant to the contract is subject to the control of the city's Department of Recreation and Parks, that under section 393 of the city charter[3] such land may be sold only with the approval of the board or officer having the management of that department, and that no such approval has been obtained. The contention, not determined in the prohibition case, is premature, because it does not appear that any actual sales or transfers of property to the baseball club have yet been made, and the city still has the opportunity to comply with these requirements of the charter. Moreover, at the time of trial herein, proceedings were pending before the city council to transfer the parcel in question from the jurisdiction of the park department on the ground that freeway construction cut off the property from the balance of Elysian Park, and, if such a transfer is accomplished, consent of the department to a sale will no longer be necessary. (See Los Angeles City Charter, § 170, subd. (d), prescribing procedure for such transfers.)

*Advance Report Citation: *Ante,* p. 425.

[3]Section 393 of the charter provides, in part, that "any real property proposed to be sold that is under the control of any board or commission authorized by this charter or by law to acquire, hold or control real property shall not be sold except at the request or with the approval of the board, commission or officer having the management of such department. . . ."

It follows from the foregoing that the judgments enjoining execution and enforcement of the contract must be reversed. [6] Kirshbaum's notice of cross-appeal from the judgment which he obtained against the city and the baseball club states, without any explanation or specification of error, that he thereby cross-appeals to this court from the whole of that judgment. In view of our conclusion that he is not entitled to any relief, his cross-appeal has become moot and should be dismissed, even if we assume that he could have brought himself within some exception to the general rule that a party cannot appeal from a judgment in his favor. (See for the general rule, *Maxwell Hardware Co. v. Foster*, 207 Cal. 167, 170 [277 P. 327]; 3 Witkin, California Procedure (1954), 2182.)

The judgment in favor of the Housing Authority and its commissioner is affirmed. The judgments against the other defendants are reversed with directions to enter judgments in their favor in accordance with this opinion and the decision in *City of Los Angeles v. Superior Court*, *ante*, *p. 423 [333 P.2d 745]. The cross-appeal of plaintiff Kirshbaum is dismissed.

Shenk, J., Traynor, J., Schauer, J., Spence, J., McComb, J., and Peters, J., concurred.

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*Advance Report Citation: *Ante*, p. 425.